The Trustees of the Masonic Hall and Asylum Fund *and* Service Employees International Union, Local 200, AFL-CIO. Case 3-CA-10681

April 29, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on October 5, 1981, by Service Employees International Union, Local 200, AFL-CIO, herein called the Union, and duly served on The Trustees of the Masonic Hall and Asylum Fund, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint on October 21, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 15, 1981, following a Board election in Case 3-RC-8112, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 24, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so, and also has refused, and continues to date to refuse, to bargain collectively with the Union by refusing to provide information requested by the Union. On October 30, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 27, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint[2] and in its response to the Notice To Show Cause, Respondent admits the Union's request for bargaining and its refusal to bargain, but attacks the Union's certification in the underlying representation proceeding. Respondent contends, in essence, that the certified service and maintenance employee unit is not appropriate and that the appropriate unit should include all of Respondent's employees. Respondent alternatively contends that an appropriate unit should include at least Respondent's service, maintenance, and technical employees.

Review of the record herein, including the record in Case 3-RC-8112, reveals that the Acting Regional Director for Region 3 issued a Decision and Direction of Election for a unit of Respondent's full-time and regular part-time service and maintenance employees on July 28, 1981. Thereafter, Respondent filed with the Board a request for review of the Acting Regional Director's Decision and Direction of Election requesting, *inter alis*, that the Board review the Acting Regional Director's determination of the appropriateness of the unit sought. On September 1, 1981, the Board by telegraphic order denied Respondent's request for review. Accordingly, on September 4, 1981, an election was conducted in the unit found appropriate which resulted in a vote of 188 for, and 125 against, the Union, with 8 challenged ballots and 1 void ballot. On September 15, 1981, the Regional Director for Region 3 certified the Union as the exclusive bargaining representative of the employees in the unit found appropriate. As noted, in its answer to the complaint and in its opposition to the Motion for Summary Judgment, Respondent does not deny the essential elements of its refusal to bargain, but claims only that the unit found appropriate in the representation proceeding is an inappropriate unit. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully

[1] Official notice is taken of the record in the representation proceeding, Case 3-RC-8112, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] In its answer to the complaint, Respondent also denies knowledge of the labor organization status of the Union. We note that in the underlying representation proceeding Respondent stipulated that the Union is a labor organization within the meaning of Sec. 2(5). We, accordingly, give no effect to this denial.

litigated and determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding, save the one discussed below, were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding concerning the underlying representation matter.

In this proceeding, Respondent also admits that it has refused to furnish the Union with the requested information,[4] but denies that the employment information sought by the Union is relevant and necessary to the Union's collective-bargaining function, and defends its refusal to furnish the requested information pertaining to the bargaining unit employees on the grounds that the certified unit is not appropriate. For the above-stated reasons, we find no merit to the latter defense. As for Respondent's denial of the relevancy of the information requested, we note it is settled that wage, fringe benefit, and employment data concerning bargaining unit employees are presumptively relevant for the purposes of collective bargaining, and must be provided upon request to the employees' bargaining representative.[5] It is also well settled that a union is not required to show the precise relevance of such information unless the employer has submitted evidence sufficient to rebut the presumption of relevance.[6] Here Respondent has not attempted to rebut the relevance of the information sought by the Union. Accordingly, we find that no material issues of fact exist with regard to Respondent's refusal to furnish the employment data sought by the Union since September 24, 1981, and we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is engaged as a health care institution in the operation of a licensed skilled nursing facility and a licensed health-related facility in Utica, New York. During the 12-month period preceding the issuance of the complaint, a representative period, Respondent, in the course and conduct of its operations, received gross revenues in excess of $1 million, and purchased and received at its Utica facility products, goods, and materials valued in excess of $50,000 which were shipped directly from points outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Service Employees International Union, Local 200, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] The information requested included the following:

An updated list of bargaining unit employees, first and last names, and their addresses.

The classification, wage rate, shift, and date of hire of all bargaining unit employees.

A list of all current benefits, including shift differential, sick leave, holidays, vacation schedule, etc.

A copy of the pension plan and the monthly dollar contribution made on behalf of each employee.

A copy of the health insurance plan and the monthly employee premium.

A detailed description of the five-step wage progression system as it affects the service and maintenance employees.

[5] *Eskimo Radiator Mfg. Co.*, 255 NLRB 304, 306 (1981); *Hotel Enterprises, Inc., d/b/a Royal Inn of South Bend*, 224 NLRB 810 (1976); *Warehouse Foods, a Division of M. E. Carten and Company, Inc.*, 223 NLRB 506, 512 (1976); *Building Construction Employers Association of Lincoln, Nebraska and M. W. Anderson Construction Co.*, 185 NLRB 34, 37 (1970); *Cowles Communications, Inc.*, 172 NLRB 1909 (1968); *Curtiss-Wright Corporation, Wright Aeronautical Division*, 145 NLRB 152, 156–157 (1963), enfd. 347 F.2d 61 (3d Cir. 1965).

[6] *Curtiss-Wright Corp.*, 347 F.2d at 69; *Eskimo Radiator Mfg. Co., supra* at 306. Thus, if the information is of potential or probable relevance, the General Counsel need not make a showing that the information sought is clearly dispositive of the negotiation issues between the parties. See *Western Massachusetts Electric Company*, 228 NLRB 607, 622 (1977) (Member Jenkins dissented on other grounds), enfd. as modified 573 F.2d 101 (1st Cir. 1978).

All full-time and regular part-time service and maintenance employees employed by The Trustees of the Masonic Hall and Asylum Fund at its Utica, New York, facility; excluding all technical employees, business office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act and all other employees.

2. The certification

On September 4, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 3, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 15, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and To Furnish Relevant Information and Respondent's Refusal*

Commencing on or about September 24, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 24, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit, and has refused to furnish the Union requested information relevant to collective bargaining.

Accordingly, we find that Respondent has, since September 24, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. We shall also order that Respondent, upon request, furnish the Union with the information it requested in writing on September 24, 1981.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Trustees of the Masonic Hall and Asylum Fund is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union, Local 200, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time service and maintenance employees employed by The Trustees of the Masonic Hall and Asylum Fund at its Utica, New York, facility, excluding all technical employees, business office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 15, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 24, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employ-

ees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing on or about September 24, 1981, and at all times material thereafter, to furnish the said labor organization with relevant information concerning the present terms and conditions of the employees in the above-described unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Trustees of the Masonic Hall and Asylum Fund, Utica, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union, Local 200, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees employed by The Trustees of the Masonic Hall and Asylum Fund at its Utica, New York, facility; excluding all technical employees, business office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act and all other employees.

(b) Refusing to bargain collectively with the above-named labor organization by refusing to furnish the said labor organization with requested information concerning the present terms and conditions of employment of the employees in the above-described unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, bargain collectively with the above-named labor organization by furnishing it with the information concerning present terms and conditions of employment it requested in writing on September 24, 1981.

(c) Post at its facility in Utica, New York, copies of the attached notice marked "Appendix."[7] Copies of said notice, on orms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union, Local 200, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to bargain collectively with the above-named Union by refusing to furnish it with the information which it has requested with respect to the present terms and conditions of employment of employees in the unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time service and maintenance employees employed by us at our Utica, New York, facility; excluding all technical employees, business office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act and all other employees.

WE WILL upon request, bargain collectively with the above-named Union by furnishing it with the information concerning present terms and conditions of employment it requested in writing on September 24, 1981.

THE TRUSTEES OF THE MASONIC HALL AND ASYLUM FUND